

NANCY MARVEL
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U.S. ENVIRONMENTAL PROTECTION AGENCY
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105

_____)	Docket No. FIFRA-09-2009-0013
In the Matter of:)	
)	
Bug Bam Products, LLC)	MOTION FOR LEAVE TO FILE
)	FIRST AMENDED COMPLAINT
)	
Respondent)	
_____)	

Pursuant to 40 C.F.R. § 22.16(a), the United States Environmental Protection Agency, Region IX (“EPA” or “Complainant”), moves for leave to file a First Amended Complaint in this matter, as provided in 40 C.F.R. §§ 22.14(d)-(c). Complainant’s reasons for seeking leave to file the First Amended Complaint are set forth below.

On September 18, 2009, Complainant filed a Complaint and Notice of Opportunity of Hearing (the “Complaint”) against Bug Bam Products, LLC (“Bug Bam” or “Respondent”) alleging three counts of violation of Section 12(a)(1)(A) of the Federal Insecticide, Fungicide and

Rodenticide Act, 7 U.S.C. § 136j(a)(1)(A), for distributing or selling the unregistered pesticides “Bug Bam Insect Repelling Wristband,” “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid.” Respondent filed an Answer dated October 15, 2009.

The most significant amendment that Complainant seeks to make to the Complaint is to add a new respondent, Flash Sales, Inc., (“Flash Sales”). Complainant became aware that Flash Sales was also a liable party for the violations alleged in the Complaint only through facts raised by Respondent’s Answer. In Paragraph 19 of its Answer, Respondent claimed that Flash Sales, and not it, distributed or sold the pesticide products. According to Respondent, “Flash Sales Inc., a Florida-based distribution company, would have been the importer of record and would have made the alleged sale of the product to the recipient from Miami, Florida.” This new information lays a basis for the filing of the First Amended Complaint. Moreover, although a separate administrative complaint could be filed against Flash Sales, Complainant believes that it is a better use of the resources of Complainant and the administrative law judge forum to pursue Flash Sales and Bug Bam in one consolidated action. This will save resources because the underlying facts establishing liability and the appropriate penalty for the violations will be almost identical in each of the cases against Flash Sales and Bug Bam. The addition of Flash Sales as a respondent is reflected in Paragraphs 2, 4, 5, 26-28, 34-36, and 42-44 of the attached proposed First Amended Complaint.

Complaint also seeks to amend the Complaint to better allege the grounds of why the minimum risk pesticide exemption set forth at 40 C.F.R. § 152.25(f) does not apply to Respondent’s distribution or sale of pesticides. Since this exemption is a defense that must be raised by Respondent, it was not necessary for Complainant to raise it at all in the Complaint to

properly plead a prima facie case pursuant to 40 C.F.R. § 22.14(a). However, due to prior discussions with Respondent, Complainant was aware that Respondent would raise this exemption as a defense to the enforcement action. Therefore, in order to limit a future hearing only to those facts actually in dispute, Complainant decided to plead facts and legal conclusion in the Complaint pertaining to the application of the exemption. However, as Respondent has denied the allegations in Paragraphs 8 and 9 pertaining to the non-application of the exemption, Complainant believes that Respondent should have the opportunity to admit or deny additional grounds for why it believes the exemption does not apply. This will help to further limit the scope of any future hearing. Moreover, these changes should be allowed in conjunction with allowing a new party, Flash Sales, as that party should be required to admit or deny the full set of facts establishing liability. This change is reflected in Paragraphs 12-20 of the attached proposed First Amended Complaint.

Finally, Complainant seeks to amend the Complaint to correct Respondent's physical address. This is simply a typographical change, which would be allowed as an errata filing. This change is reflected in Paragraph 3 of the attached proposed First Amended Complaint.

As to a motion to amend a complaint, no standard is provided in the Rules for determining whether to grant the motion for amendment. The general rule is that administrative pleadings are "liberally construed and easily amended." *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992) (quoting *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985)). Such motions are analyzed under the standard applied in Federal court for amendment of pleadings: "[i]n the absence of ... undue delay, bad faith or dilatory motive on the part of the movant ... undue prejudice to the opposing party ... [or] futility

of amendment,” amended pleadings should be allowed.” *Foman v. Davis*, 371 U.S. 178, 181-182 (1962). As stated by the Supreme Court, “The Federal Rules [of Civil Procedure] reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

The granting of EPA’s motion for leave to file the First Amended Complaint, as attached, will not prejudice or present an undue hardship to Respondent. The First Amended Complaint does not cite additional violations nor does it increase the proposed penalty. The motion mostly seeks to include a new respondent, Flash Sales, as a jointly and severally liable party. Moreover, the expansion of the claims about the minimum risk pesticide exemption will only help limit the area of dispute at the hearing after Respondent has had a chance to respond to the First Amended Complaint.

In *In Re Strong Steel Products, LLC*, Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020 & MM-5-2001-0006 (Oct. 27, 2003), Administrative Law Judge Biro found that no hardship or prejudice existed in the granting of a motion to amend an administrative complaint where it does not create the need for additional discovery or change of the hearing date. As the prehearing exchange date has not yet been set, there is no chance that granting of this motion will change any dates of discovery or litigation. Moreover, even if the prehearing exchange date were set, given the ample notice of the violations to the Respondent, no extension of the discovery deadlines would be needed or warranted. Finally, the granting of leave to amend the Complaint is consistent with the U.S. Supreme Court’s directive that courts should liberally allow amendment of pleadings.

For the reasons set forth herein, the Complaint moves the Administrative Law Judge to grant Complainant leave to file and serve upon the respondents Bug Bam and Flash Sales the attached First Amended Complaint, once executed, pursuant to 40 C.F.R. § 22.14(c).

Respectfully submitted,

DATED: 11/18/09

A handwritten signature in blue ink, appearing to read "Ivan Lieben", written over a horizontal line.

Ivan Lieben
Assistant Regional Counsel
USEPA, Region IX

ATTACHMENT

NANCY MARVEL
Regional Counsel
United States Environmental Protection Agency, Region IX

IVAN LIEBEN
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(415) 972-3914

Attorneys for Plaintiff

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105

In the Matter of:)	Docket No. FIFRA-09-2009-0013
)	
Bug Bam Product, LLC; and)	FIRST AMENDED COMPLAINT AND
Flash Sales, Inc.)	NOTICE OF OPPORTUNITY
)	FOR HEARING
Respondents)	
)	

AUTHORITY AND PARTIES

This is a civil administrative action brought pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a), for the assessment of a civil administrative penalty against Bug Bam Products, LLC and Flash Sales, Inc., for the sale and distribution of unregistered pesticides in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Complainant is the Associate Director for Agriculture of the Communities and Ecosystems Division, United States Environmental Protection Agency ("EPA"), Region IX. The

Administrator of EPA delegated to the Regional Administrator of Region IX the authority to bring this action under FIFRA by EPA Delegation Order Number 5-14, dated May 11, 1994. The Regional Administrator of Region IX further delegated the authority to bring this action under FIFRA to the Associate Director for Agriculture of the Communities and Ecosystems Division by EPA Regional Order Number 1255.08 CHG1, dated June 9, 2005.

Respondents are Bug Bam Products, LLC ("Bug Bam") and Flash Sales, Inc. ("Flash Sales").

GENERAL ALLEGATIONS

1. Bug Bam, a California corporation, is a "person" as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and is subject to FIFRA and the implementing regulations promulgated thereunder.
2. Flash Sales, a Florida corporation, is a "person" as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s), and is subject to FIFRA and the implementing regulations promulgated thereunder.
3. Bug bam has an office located at 414 2nd street, Suite 241, Hermosa Beach, California 90254-4673.
4. Flash Sales has an office located at 4401 NW 167th Street, Miami, Florida 33055.
5. Respondents collectively distribute or sell insect repellant products.
6. The products distributed or sold by Respondents are "Bug Bam Insect Repelling Wristband," "Bug Bam for Kids Insect Repelling Wristband" and "Bug Bam Insect Repelling Grid" (the "Bug Bam Products").
7. "Bug Bam Insect Repelling Wristband," "Bug Bam for Kids Insect Repelling Wristband"

- and “Bug Bam Insect Repelling Grid” (the “Bug Bam Products”) each claim to repel mosquitoes.
8. Mosquitoes are “pests” as that term is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t).
 9. A “pesticide” means “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.” 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3(s).
 10. “Bug Bam Insect Repelling Wristband,” “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid” are “pesticides” as defined by 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3(s) in that they are substances or mixtures of substances intended for preventing, destroying, repelling, or mitigating “pests.”
 11. At all times relevant to this action, “Bug Bam Insect Repelling Wristband,” “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid” were not registered with EPA.
 12. 40 C.F.R. § 152.25(f) exempts products containing certain active and inert ingredient if all of the following conditions of exemption are met: each product (1) must contain active ingredients listed under 40 C.F.R. § 152.25(f)(1); (2) must contain inert ingredients in the most current List 4A or listed under 40 C.F.R. § 180.950; (3) must bear a label identifying the name and percentage (by weight) of each active ingredient and must name each inert ingredient; (4) must not bear claims either to control or mitigate microorganisms that pose a threat to human health or claims to control insects or rodents carrying specific diseases; (5) and must not include false and misleading statements.
 13. EPA maintains a list of approved inerts for 40 C.F.R. § 152.25(f) exemption purposes at

40 C.F.R. § 180.950 and www.epa.gov/opprd001/inerts/section25b_inerts.pdf.

14. On or about February 25, 2009, the packaging for “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid” listed as the active ingredients “pure essential oils including citronella,” and did not individually list each active ingredient.
15. On or about February 25, 2009, the Bug Bam Products used a red colorant which was not listed on the package and is not “red cabbage color, expressed from edible red cabbage heads via a pressing process using only acidified water.”
16. On or about February 25, 2009, the packaging for “Bug Bam for Kids Insect Repelling Wristband” and “Bug Bam Insect Repelling Grid” listed thermoplastic elastomers, or TPE, as an inert ingredient.
17. The red colorant and TPE used by Respondents in the Bug Bam Products identified in Paragraphs 16 and 17 are not listed on the most current List 4A or under 40 C.F.R. § 180.950.
18. On or about February 25, 2009, Bug Bam claimed that the Bug Bam Products protect users from specific diseases carried by mosquitoes.
19. On or about February 25, 2009, Bug Bam claimed that the Bug Bam Products were “comprised of EPA approved ingredients,” contained “EPA/FDA GRAS [Generally Recognized as Safe] approved ingredients”, and that the products were scientifically proven to be an effective mosquito repellent.
20. On or about February 25, 2009, for the reasons set forth in Paragraphs 14-19, “Bug Bam Insect Repelling Wristband,” “Bug Bam for Kids Insect Repelling Wristband,” and “Bug Bam Insect Repelling Grid” did not meet the requirements to be classified as minimum

risk pesticides as defined by 40 C.F.R. § 152.25(f).

21. To “distribute or sell” means to “distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receiving and (having so received) deliver or offer to deliver.” 7 U.S.C. § 136(gg).
22. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), makes it unlawful for any person to distribute or sell to any person any unregistered pesticide.

ALLEGED VIOLATIONS

Sale or Distribution of Unregistered Pesticides, 7 U.S.C. § 136j(a)(1)(A).

COUNT 1

23. Paragraphs 1 through 22 are realleged and incorporated herein by reference.
24. On or about February 25, 2009, an employee of EPA identified as Frank Carpenter, accessed the website www.bugbam.com where he purchased the product “Bug Bam Insect Repelling Wristband.”
25. The website bugbam.com was registered to, administered by, and/or under the control of Bug Bam on or about February 25, 2009.
26. The website bugbam.com offered for sale the product “Bug Bam Insect Repelling Wristband” on or about February 25, 2009.
27. On or about February 25, 2009, Flash Sales was acting as the sales distributor for the Bug Bam product “Bug Bam Insect Repelling Wristband.”
28. Flash Sales sent the product “Bug Bam Insect Repelling Wristband” via mail to Mr. Carpenter after the purchase of the item on the bugbam.com website on or about February 25, 2009.

29. As a result, on or about February 25, 2009, Respondents jointly distributed or sold "Bug Bam Insect Repelling Wristband."
30. Respondents' sale or distribution of "Bug Bam Insect Repelling Wristband," an unregistered pesticide, constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

COUNT 2

31. Paragraphs 1 through 22 are realleged and incorporated herein by reference.
32. On or about February 25, 2009, an employee of EPA identified as Frank Carpenter, accessed the website www.bugbam.com where he purchased the product "Bug Bam for Kids Insect Repelling Wristband."
33. The website bugbam.com was registered to, administered by, and/or under the control of Bug Bam on or about February 25, 2009.
34. The website bugbam.com offered for sale the product "Bug Bam for Kids Insect Repelling Wristband" on or about February 25, 2009.
35. On or about February 25, 2009, Flash Sales was acting as the sales distributor for the Bug Bam product "Bug Bam for Kids Insect Repelling Wristband."
36. Flash Sales sent the product "Bug Bam for Kids Insect Repelling Wristband" via mail to Mr. Carpenter after the purchase of the item on the bugbam.com website on or about February 25, 2009.
37. As a result, on or about February 25, 2009, Respondents jointly distributed or sold "Bug Bam for Kids Insect Repelling Wristband."
38. Respondents' sale or distribution of "Bug Bam for Kids Insect Repelling Wristband," an

unregistered pesticide, constitutes a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

COUNT 3

39. Paragraphs 1 through 22 are realleged and incorporated herein by reference.
40. On or about February 25, 2009, an employee of EPA identified as Frank Carpenter, accessed the website www.bugbam.com where he purchased the product "Bug Bam Insect Repelling Grid."
41. The website bugbam.com was registered to, administered by, and/or under the control of Bug Bam on or about February 25, 2009.
42. The website bugbam.com offered for sale the product "Bug Bam Insect Repelling Grid" on or about February 25, 2009.
43. On or about February 25, 2009, Flash Sales was acting as a sales distributor for the Bug Bam product "Bug Bam Insect Repelling Grid."
44. Flash Sales sent the product "Bug Bam Insect Repelling Grid" via mail to Mr. Carpenter after the purchase of the item on the bugbam.com website on or about February 25, 2009.
45. As a result, on or about February 25, 2009, Respondents jointly distributed or sold "Bug Bam Insect Repelling Grid."
46. As a result, on or about February 25, 2009, Respondents distributed or sold "Bug Bam Insect Repelling Grid."
47. Respondents' sale or distribution of "Bug Bam Insect Repelling Grid," an unregistered pesticide, constitutes a violation of Section 12(a)(1)(A) of FIFRA.

PROPOSED CIVIL PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and the Civil Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19, authorize the assessment of a civil administrative penalty of up to \$7,500 for each violation of FIFRA occurring after January 12, 2009. For purposes of determining the amount of the civil penalty to be assessed, FIFRA Section 14(a)(4) requires EPA to consider the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violations alleged. Based on the violations alleged in this Complaint, and after consideration of the statutory factors enumerated above, EPA proposes to assess the following civil penalty jointly and severally against the Respondents pursuant to FIFRA Section 14(a) and the FIFRA Enforcement Response Policy dated July 2, 1990 (a copy of which is enclosed with this Complaint), which provides a rational, consistent and equitable calculation methodology for applying the statutory penalty factors enumerated above:

Count 1 (Sale and/or distribution of an unregistered pesticide, violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A))	\$3,825
Count 2 (Sale and/or distribution of an unregistered pesticide, violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A))	\$3,825
Count 3 (Sale and/or distribution of an unregistered pesticide, violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A))	\$3,825
TOTAL (after rounding to nearest \$100)	\$11,500

NOTICE OF OPPORTUNITY FOR HEARING

Answer and Administrative Hearing

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Renovation or Suspension of Permits ("Consolidated Rules of Practice"), 40

C.F.R. Part 22, govern these proceedings. A copy of the Consolidated Rules of Practice accompanies this Complaint.

Under these rules, you have the right to request a hearing. Any request for a hearing must be in writing and must be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, California within thirty (30) days of receipt of this Complaint. In the event that you intend to request a hearing to contest any material facts set forth in the Complaint, to dispute the amount of the penalty proposed in the Complaint, or to assert a claim for judgment as a matter of law, you must file a written Answer to this Complaint with the Regional Hearing Clerk at the above address within thirty (30) days of receipt of this Complaint. A copy of your Answer should also be sent to:

Ivan Lieben
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

Your Answer should clearly and directly admit, deny, or explain each factual allegation contained in this Complaint with regard to which you have any knowledge. The Answer should state: (1) the circumstances or arguments which are alleged to constitute the grounds of defense; (2) a concise statement of the facts which you intend to place at issue in the hearing; and (3) whether a hearing is requested. Hearings held in the assessment of the civil penalties will be conducted in accordance with the provisions of the Administrative Procedures Act, 5 U.S.C. §§ 551 et seq., and the Consolidated Rules of Practice. 40 C.F.R. Part 22.

If you fail to file an Answer to this Complaint with the Regional Hearing Clerk within thirty (30) days of receipt, such failure shall constitute an admission of all facts alleged in the

Complaint and a waiver of your right to a hearing under Section 113(d)(2). The proposed penalty shall become due and payable by you without further proceedings sixty (60) days after a final order issued upon default.

Settlement Conference

EPA encourages all parties against whom civil penalties are proposed to pursue the possibilities of settlement through informal conferences. Therefore, whether or not you request a hearing, you may confer informally with the Agency concerning the alleged violations or the amount of the proposed penalty. You may wish to appear at the conference yourself or be represented by counsel. If a settlement is reached, it shall be finalized by the issuance of a written Consent Agreement and Final Order by the Regional Judicial Officer, EPA, Region IX. The issuance of such Consent Agreement and Final Order shall constitute a waiver of your right to request a hearing of any matter stipulated to therein.

To explore the possibility of settlement in this matter, address your correspondence to:

Ivan Lieben
Assistant Regional Counsel (ORC-3)
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

His telephone number is (415) 972-3914.

Instead of requesting an informal settlement conference or filing an Answer requesting a hearing, you may choose to pay the proposed penalty. In order to do this, please contact Mr. Ivan Lieben to arrange for the preparation of a Consent Agreement and Final Order.

After this Complaint is issued, the Consolidated Rules of Practice prohibit ex parte (unilateral) discussion of the merits of any action with the EPA Regional Administrator, Chief

Judicial Officer, Administrative Law Judge, or any person likely to advise these officials in the decision of this case.

Dated at San Francisco, California on this ____ day of _____, 2009.

Katherine A. Taylor
Associate Director for Agriculture
Communities and Ecosystems Division
USEPA, Region IX

CERTIFICATE OF SERVICE

I certify that the original and one copy of the foregoing Amended Complaint and Notice of Opportunity for Hearing was hand delivered to:

The Regional Hearing Clerk
United States Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

and that a true and correct copy of the Amended Complaint; the Consolidated Rules of Practice, 40 C.F.R. Part 22; and the FIFRA Enforcement Response Policy were placed in the United States Mail, certified mail, return receipt requested, addressed to the following:

Joseph Symond
President
Bug Bam Products, LLC
414 2nd street, Suite 241
Hermosa Beach, California 90254-4673

Jacob Levy
President
Flash Sales, Inc.
4401 NW 167th St.
Miami, Florida 33055

Dated: _____

By: _____

Ekho Lim
U.S. Environmental Protection Agency, Region IX

In the Matter of Bug Bam Products, LLC

Docket No. FIFRA-09-2009-0013

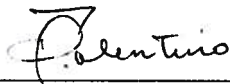
CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Complainant's Motion For Leave to File First Amended Complaint was filed with the Regional Hearing Clerk, U.S. EPA, Region IX, and that a copy was faxed and sent by Pouch Mail and first class certified return receipt mail, respectively, to:

The Honorable Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, D.C. 20460
Facsimile: (202)565-0044

and to: Martha E. Marrapese
Keller and Heckman LLP
1001 G Street, N.W., Suite 500 West
Washington, D.C. 20001
Facsimile: (202)434-4646

11/18/09
Date


Corazon Tolentino
Office of Regional Counsel
U.S. EPA, Region IX